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No. 91-922

In The

Supreme Court of the United States

October Term, 1991

THE STROH BREWERY COMPANY,

Petitioner,

vs.

DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

We consider the statement of the petitioner of the question presented for review to be misleading.

The decision of the New Mexico Supreme Court in this case was primarily based on the New Mexico law of the case doctrine, which is a procedural bar to re-litigation in the case of an issue already decided by the New Mexico Supreme Court. The actual question of federal retroactivity was merely a side issue bearing on whether or not the New Mexico Supreme Court's original decision in the case was clearly and palpably erroneous, as well as unjust. No substantial federal question is presented.

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ARGUMENT

I. THE NEW MEXICO SUPREME COURT DID NOT ERRONEOUSLY DECIDE A SUBSTANTIAL FEDERAL QUESTION.

The first New Mexico Supreme Court decision in this case was *United States Brewers Association, Inc., v. Director of the New Mexico Department of Alcoholic Beverage Control,* 100 N.M. 216, 688 P.2d 1093 (1983); appeal dismissed 465 U.S. 1093, 104 S.Ct. 1581, 80 L.Ed.2d 115 (1984). In dismissing the appeal to the United States Supreme Court,

this Court stated that it was "dismissed for want of a substantial federal question."

Since this case was previously appealed, and this Court decided that there was no substantial federal question, and dismissed the appeal, under the law of the case doctrine as laid down by the United States Supreme Court, that question should not be re-examined, and the petition for writ of certiorari should be denied on that basis.

In *Tyler v. McGuire*, 84 U.S. 253, 17 Wall. 253, 21 L.Ed. 1056 (1873) the court stated:

> . . . None of the questions which were before the court on the first writ of error can be reheard or examined upon the second, as it would lead to endless litigation. *Sizer v. Many*, 16 How. 98; *Corning v. Iron Co.*, 15 How. 466; *Himely v. Rose*, 5 Cranch, 315; *Martin v. Hunter*, 1 Wheat. 355. (21 L.Ed. 383)

The opinion in *Clark v. Keith*, 106 U.S. 464, 1 S.Ct. 568, 27 L.Ed. 302 (1883) states:

> . . . That question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error cannot be re-examined on a subsequent writ brought in the same suit. * * * (27 L.Ed. 302)

The above principles were further explained in *Messinger v. Anderson*, 225 U.S. 436, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). Mr. Justice Holmes stated that the law of the case doctrine did not limit the power of the United States Supreme Court to re-examine a question, but it expresses the practice of courts generally to refuse to reopen what

has already been decided. An extreme situation was presented in that case, which required its reconsideration for justice to be done, as the matter had become res judicata because of another action between the two decisions of the circuit court of appeals in the case.

A number of the cases that have come before the United States Supreme Court were on law of the case questions in lower courts, and few appear to have involved prior decisions of this Court in the same case, as did the three cases referred to above.

When these cases are considered together it would appear that the law of case doctrine, as stated by this Court, is very similar to the law of the case doctrine in New Mexico.

Even without the federal law of the case bar, this case still presents no substantial federal question that should be decided by this Court. The New Mexico Supreme Court decision is primarily based on two questions of State law. They are construction of the bond involved, – purely a question of State law; and the application of the New Mexico law of the case doctrine.

The law of the case doctrine, as applied in New Mexico, is a procedural bar which prohibits re-litigating an issue previously decided in the same case, with certain very restricted exceptions, none of which apply here.

The federal retroactivity question is merely a side issue relating to whether or not our State Supreme Court's prior decision in this case was both clearly erroneous at the time it was decided, and, in addition, would work an injustice.

The Petitioner is asking this court to direct the New Mexico Supreme Court on how it should apply its own law of the case doctrine, which is clearly New Mexico law.

The petitioner erroneously relies on *James B. Beam Distilling Company v. Georgia*, 501 U.S. ___, 115 L.Ed.2d 481, 111 S.Ct. 2439 (1991). Justice Souter's controlling opinion in that case, in which Justice Stevens joined, states:

> Of course, retroactivity in civil cases must be limited by the need for finality, see *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 84 L.Ed. 329, 60 S.Ct. 317 (1940); once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed. * * * (115 L.Ed.2d 492)
>
> * * *
>
> * * * While those whose claims have been adjudicated may seek equality, a second chance for them could only be purchased at the expense of another principle. "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties." * * * (115 L.Ed.2d 493)
>
> The grounds for our decision today are narrow. * * * (115 L.Ed.2d 493)
>
> * * * Nothing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must

> be provided, a matter with which *McKesson* did not deal. * * * (115 L.Ed.2d 494)

Included under Point II is our explanation showing that the decision of the New Mexico Supreme Court in this case was primarily, if not wholly, based on the application of the New Mexico procedural bar of the law of the case doctrine.

Even if the New Mexico Supreme Court were considered wrong in its reasoning on the federal retroactivity issue, it was still entitled to apply its own procedural bar to re-litigation under the law of the case.

The first New Mexico Supreme Court decision left nothing to do in this case, other than determine the amounts owed under the bond. The record will show a substantial amount of work done in discovery and litigation in regard to the amounts, and while this was ongoing, the United States Supreme Court decided *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 106 S.Ct. 2080 (1986). Stroh then tried to re-litigate the constitutional matter previously litigated and determined.

Certainly Stroh should not be allowed to use the time in which it delayed payment of the amounts owed under the prior decisions of the State District Court, the New Mexico Supreme Court, and the United States Supreme Court, to again re-litigate the matters already decided.

II. THE NEW MEXICO DECISION WAS PRIMARILY BASED ON STATE LAW AND WAS CORRECT.

The opinion of the New Mexico Supreme Court in this case distinctly shows that its decision was based on the New Mexico law of the case doctrine. It stated:

> The parties advance the following arguments on appeal. Stroh argues that our holding in *United States Brewers Ass'n* is not the law of the case and should not be applied as such in determining if Stroh is liable under the bond. * * * Under the supremacy clause of the United States Constitution, Stroh argues, we must follow the mandate of *Healy II* in holding the 1979 law invalid, and thus absolve Stroh from any liability under the bond. (Pet.App. 7a)
>
> The Director counters by arguing that under the Supreme Court's recent holding in *American Trucking Associations v. Smith*, 495 U.S. ___, (1990), *Healy II* should not be given "retroactive effect." Consequently, the Director argues, our prior ruling on the 1979 law in *United States Brewers Ass'n* is the law of the case and must be given effect now, regardless of any subsequent invalidation of the 1979 law by *Healy II*. The director also urges a different reading of New Mexico law of the case doctrine than that asserted by Stroh. By that doctrine, the Director argues, we correctly decided *United States Brewers Ass'n* based on *Seagram*, the applicable governing precedent at the time of our decision. Hence, our decision in the case, establishing the law of the case, was not "clearly, palpably or manifestly erroneous or unjust." (Pet.App. 7a-8a)

* * *

* * * Neither our decision in *United States Brewers Ass'n*, nor the trial court's ruling appealed in that case, were "clearly, palpably, or manifestly erroneous," as the Supreme Court itself has only just held that *Seagram* is no longer good law. How could a decision based on the right law at that time now be a "manifestly erroneous" decision? (Pet.App. 13a)

Further, neither our decision in *United States Brewers Ass'n*, nor the trial court's ruling appealed in that case have produced an unjust result, * * * . (Pet.App. 13a)

* * *

Therefore, under the law of this case, *Healy II* does not invalidate the 1979 law. As the trial court correctly ruled, the law of this case is that dictated by our holding in *United States Brewers Ass'n* and the underlying trial court decision appealed in that case. The recent case of *James B. Beam Distilling Co. v. Georgia*, 59 U.S. L.W. 4735 (June 20, 1991), notwithstanding, which we find inapplicable, we affirm the judgment below on the *central issue* discussed above. (Emphasis supplied.) (Pet.App. 14a)

The above language leaves no question that the law of the case doctrine, as stated by the court, was the "central issue" on which the case was decided.

Justice Franchini's concurring opinion further explains the court's decision on the law of the case in conjunction with the *Beam* decision, as follows:

. . . The matter before us today has been in litigation since 1979, and Stroh is subject to our

> decision in *United States Brewers Association v. Director of N. M. Department of Alcoholic Beverage Control* 100 N.M. 216, 668 P.2d 1093 (1983), *appeal dismissed sub nom. United States Brewers Association v. Rodriguez*, 465 U.S. 1093 (1984), which we find to be controlling here as the law of the case. Application of the law of the case doctrine in this matter places this case squarely in the context of those cases beyond the narrow scope of the *Beam* decision. (Pet.App. 16a)

It has long been recognized in New Mexico that the law of the case doctrine, as applied to a former appeal, is a procedural bar, similar to, and with aspects of, res judicata, which prohibits the re-litigating of an issue decided in the prior appeal. *Union Trust Co. of New York v. A. T. & S. F. R. Co.*, 8 N.M. 159, 42 Pac. 89 (1895); *Crary v. Field*, 10 N.M. 257, 61 Pac. 118 (1900).

Whether right or wrong, the law of the case as decided in the prior appeal is controlling in the second appeal. *Sanchez v. Torrez*, 38 N.M. 556, 37 P.2d 805 (1934). As explained by the New Mexico Supreme Court in this present case, two requirements must be met if the law of the case is not to be applied. First, the prior decision must have been clearly, palpably, or manifestly erroneous. Secondly, its application would have to amount to an injustice in the case. The first decision of the Court was certainly not erroneous, and an injustice would only result if the law of the case doctrine were not applied. Both the New Mexico District Court and the New Mexico Supreme Court, within their prerogatives on state law, decided both of these issues in favor of the respondents.

The idea that the original decision of the New Mexico Supreme Court was erroneous is even more of a fiction than the premise that this court did not change the existing law when it overruled the *Seagram* decision.

In 1983, the New Mexico Supreme Court did not even have the jurisdictional power to overrule *Seagram & Sons v. Hostetter,* 384 U.S. 35, 86 S.Ct. 1254 (1966).

To argue that the first decision in this case was "clearly and palpably erroneous" defies reason.

We recognize that the State law of the case doctrine, in some instances, may not be an unqualified bar to examination of the question by the United States Supreme Court. See *Hathorn v. Lovorn,* 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). In this case a petition for writ of certiorari had been previously denied.

However, there are vital and controlling differences between our case and the *Hathorn* case. Both decisions of the Mississippi Supreme Court in the *Hathorn* case were contrary to federal law at the time the decisions were made. No subsequent law change was involved, and neither decision was based on a particular period of time in which a previously existing law was in effect, as we have in our case.

Justice O'Connor noted that if the state law of the case doctrine barred examination in situations such as the *Hathorn* case an interlocutory State Court decision could prevent the opportunity of the United States Supreme Court to examine the federal question at issue. This certainly doesn't exist in our case, because this Court had an

opportunity to examine the question, and did determine that there was no substantial federal question.

In the *Hathorn* case, Justice O'Connor also recognized that a State procedural rule could be a bar to re-litigation of an issue, if "strictly and regularly followed." As previously explained, the New Mexico Supreme Court strictly and regularly follows its law of the case doctrine, with the exceptions noted.

Certainly the latest case that we know of on this subject, which is the *Beam* case, specifically states that the State procedural bars may be raised to re-litigation of a decided issue.

Both decisions of the New Mexico Supreme Court in this case were correct, whereas both decisions of the Mississippi Supreme Court in the *Hathorn* case were incorrect.

This Court should not reverse a correct decision of the New Mexico Supreme Court, where the federal retroactivity issue was related as a collateral matter in determining whether its first decision should be considered manifestly erroneous. Regardless of whether or not *Healy II* should be considered retroactive in some cases, it certainly should not be considered as making the first decision of the New Mexico Supreme Court incorrect, when it was based on the controlling law at the time and, without question, was correct.

We also respectfully submit that all of this is a question of State law which should not be dictated to New Mexico by the United States Supreme Court.

III. ALTHOUGH NOT A NECESSARY FACTOR, THE DECISION BELOW CORRECTLY STATED FEDERAL LAW.

We consider the procedural bar of the New Mexico law of the case doctrine, as applied by the New Mexico Supreme Court, to be conclusive in this case, and that it is unnecessary to even consider retroactivity under Point III.

However, even without that bar, we deem the particular facts of this case to support the application of nonretroactivity, even under the reasoning of Justices Souter, Stevens, Blackmun, Marshall, and Scalia in the *Beam* case, since *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971), has not been overruled. Justice Souter's opinion in *Beam* states:

> . . . Conversely, nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases. (115 L.Ed.2d 493)

As explained by the New Mexico Supreme Court in this case, there is no doubt that New Mexico had liquor price discrimination laws from 1967 until the decision of this court in *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 109 S.Ct. 2491 (1989) (*Healy II*).

All of the distillers selling products in New Mexico would have presumably complied with that law during all of that time, since the law presumes that public officials perform their duties. *Herrera v. Zia Land Co.*, 51 N.M. 390, 185 P.2d 975 (1947). All of the brewers would have presumably complied with that law during all of the period they were within its purview, or settled their cases

as to the amounts owed pursuant to the first decision of the New Mexico Supreme Court in this case, except The Stroh Brewery Company. It would be grossly inequitable to allow Stroh to be the only liquor supplier in New Mexico to escape the law during the period it was in effect, and penalize the New Mexico wholesalers who distributed its products, by allowing them to be the only wholesalers in the State to be overcharged by the unlawful pricing practices. And there is no question that the pricing was unlawful during all of the period for which the overcharges were determined.

We would point out, as did the New Mexico Supreme Court, that in the *Healy II* case in question, this Court expressly recognized that it was changing the law as it existed prior to the overruling decision, stating:

> To the extent that *Seagram* holds that retrospective affirmation statutes do not sufficiently violate the commerce clause, *it is no longer good law.* (Emphasis supplied.) (491 U.S. 343)

We certainly do not agree with Stroh's reasoning on the retroactivity aspects of *Healy II*. The basic action was for a declaratory judgment and an injunction. This does not call for retroactive relief, such as tax refunds cases. Nothing whatsoever indicates that any court involved was doing anything or making any decision to undo or make ineffective the compliance with the law prior to the Court of Appeals declaring it invalid. Certainly, the affirmance by the United States Supreme Court of the Court of Appeals decision would make the decision valid when it was rendered, but it would not make it retroactive. The posture of the case and the nature of the relief requested would not even present the question of retroactivity in

either the lower court cases or the United States Supreme Court case.

The language of this Court, if anything, was prospective.

There are also other more direct reasons why *Healy II* should not be given retroactive effect insofar as our case is concerned.

Healy II dealt with a concurrent price affirmation statute under Connecticut law. Our case does not involve the Connecticut statute, and the New Mexico statute on which the over-charges were based was retrospective, such as was approved in *Seagram*.

The statement of the United States Supreme Court in *Healy II* that retrospective affirmation statutes are "no longer good law" was a gratuitous statement, and cannot be reasonably construed as retroactively eliminating the effectiveness of all price affirmation statutes all over the country for the more than twenty years they were in effect prior to the decision. The only logical application is that these statutes, such as the one in New Mexico, would thereafter no longer be considered valid.

The District Court's opinion in this case shows that all of the relief afforded was based on the New Mexico retrospective price discrimination statute in effect in 1979. It also shows that it was based on the New Mexico law of the case doctrine. The New Mexico District Court stated (Pet.App. 36a):

> 2. The decision of the Supreme Court of New Mexico in *The United States Brewers Association, Inc. v. Rodriguez*, 100 N.M. 216, 668 P.2d

1092 (1983), upholding the constitutionality of the 1979 Law is *res judicata* and the law of the case in this matter.

3. The 1979 Law was constitutional and valid and provided a continuing basis for Stroh's liability pursuant to the Preliminary Injunction Bond and the Supersedeas Bond from the period June 15, 1979 through February 21, 1985.

The New Mexico Supreme Court noted the basis of the decision of the District Court as to liability under the 1979 Law, and affirmed the decision in its entirety. (Pet.App. 6a, 14a)

The argument that the statement in *Healy II*, that retrospective statutes were no longer good law, should be applied retroactively to parties that were not before the Court, to a statute that was not before the Court, and in the circumstances of this case, belies reason and justice.

We also disagree with the fallacious reasoning of Stroh that this case should be used as a vehicle to change the existing law relating to the retroactive effect of court decisions which change the law.

If the law on retroactivity is going to be changed, it should go the opposite direction of that argued by Stroh. Overruling decisions should be given retroactive effect only in cases where demonstrated equities require it for justice in a particular case.

It is the retroactive law change that is disruptive and works mischief to an extent that often cannot be determined or foreseen.

The legislatures, which are supposed to be the law making bodies of government, do not even have the power in many instances to make retroactive law changes.

Surely this Court should not make retroactive law changes as a matter of course.

When a long standing precedent supporting numerous subsequent statutes of the states is reversed by the Supreme Court of the United States, it is patently fallacious to say that the law has not been changed, and worse than fiction to pretend that the Court has only just discovered what the law was in the past.

The state legislatures, state courts, and all lower federal courts, must abide by the interpretation of the law by the United State Supreme Court. When it reverses its position, the law on the subject is definitely changed. The change is just as emphatic, and often more disruptive, than it would be if made by the legislature.

All the reliance that should be required to prevent retroactive application of a law changing decision is the reliance of the State legislature in passing the law pursuant to and consistent with the existing precedent laid down by this Court. However, if more equitable reasons are needed, they are abundant in this case, as previously explained.

This is the highest court in the land. It should not decide the important matters before it on a premise that is pure fiction.

This case is an invitation to the Court to ignore reality and accept the false argument that liquor price

discrimination laws did not exist in New Mexico and throughout the country for over twenty years.

We respectfully submit that the reasoning of Justice O'Connor, in the *Beam* case, joined in by Chief Justice Rehnquist and Justice Kennedy, should be applied to this case. And, on our particular facts, it would not be contrary to the reasoning of Justices Souter and Stevens in the controlling opinion. Justice O'Connor stated:

> * * * I reiterate, however, that precisely because this Court has "the power 'to say what the law is,'. . . . " . . . when the Court changes its mind, the law changes with it. * * * (115 L.Ed.2d 498)
>
> * * *
>
> " . . . because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent." (115 L.Ed.2d 502)

We also consider applying non-retroactivity in this case consistent with Justice White's concurring opinion in the *Beam* case.

Justice Scalia, in his concurring opinion in *Beam*, recognized "that judges in a real sense 'make' law."

Justice Scalia's reasoning in his concurring opinion in *American Trucking Assn's., Inc. v. Smith*, 483 U.S. 954, 110 S.Ct. 2323 (1990), should be applied to the facts of this case. Justice Scalia stated:

> Accordingly, I would affirm the decision below with respect to Arkansas' HUE taxes imposed pre-*Scheiner*, because in my view they

were constitutional. I would reverse the decision below with respect to Arkansas' HUE taxes imposed post-*Scheiner* because they were unlawful by virtue of that decision. I thus concur in the judgment of the Court. (110 S.Ct. 2345)

CONCLUSION

This Court has previously decided that this case did not involve a substantial federal question. That issue should not be re-litigated at this late date.

Also, the primary basis of the decision of the New Mexico Supreme Court was the application of the New Mexico law of the case doctrine, which is a procedural bar to re-litigation of decided issues in the case. It is a question of State law which should not be dictated to New Mexico by the United States Supreme Court.

Even if only the federal constitutional law were involved, the facts of the case do not establish that the New Mexico Supreme Court abused its discretion in determining the equities under the particular circumstances of the case.

For these reasons, any one of which would be sufficient by itself, the petition for writ of certiorari should be denied.

Respectfully submitted,

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